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No. 232

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

TEXAS AND NEW ORLEANS RAILROAD COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans

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ELMORE H. BORCHERS,
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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary Statement of Matter Involved

This is a suit by the United States for a declaratory judgment construing two freight rate circulars or tariffs promulgated by the Railroad Commission of Texas and to determine thereby the correct intrastate rate on sand, gravel, and related articles from all points in Texas to a station called Flour Bluff. All defendants in the District Court (petitioners here) were railroad corporations.

On August 1, 1940, the Texas Railroad Commission issued its circular providing for a special rate on the subject ma-

terials from all points in Texas to the station of Flour Bluff. This special rate was accomplished by providing in effect that thereafter on joint line hauls the single line rate (lower than the normal rate for joint line hauls) should apply.

The material portion of this tariff is in words as follows:

> "(a) On sand, gravel, crushed stone, crushed asphalt rock, asphalt coated sand, gravel, stone or rock and related articles, from all points of origin to Flour Bluff, standard single line scale based on short line distance shall apply."

Several months thereafter the Railroad Commission of Texas revised the general rates on the subject materials by lowering both the general joint line rates and the single line rates. No direct reference was made to the first circular or to any other special rate, but in its opinion, which was made a part of this second order, the Texas Railroad Commission said:

> "from the evidence offered existing special rates, *where lower than the prescribed rates*, should be continued."

Immediately following this statement and as a part of its circular the Commission further provided:

> "We further find that the evidence does not justify cancellation of any existing special rates, and that the said special rates should be retained, *the rates to be prescribed to be applied if lower*."

By its findings of fact and conclusions of law and by written opinion accompanying its decree, the trial court ruled in effect:

(1) that the case was a proper one for a declaratory judgment;

(2) that by its second order above referred to the Texas Railroad Commission intended the new general rates to be applicable in all instances except those where previously prescribed special rates were lower than the new general rates (R. 57, 58).

As a result of the foregoing findings, it followed (and the trial court held) that the new joint line rates to Flour Bluff would be applicable to joint line shipments of the subject materials because they were lower than the old special rates which resulted from the application of the single line rate to joint line hauls.

The United States appealed from the judgment of the District Court to the Circuit Court of Appeals for the Fifth Circuit, which latter court by its judgment of May 10, 1945, reversed the judgment of the District Court and held specifically that the first circular of the Texas Railroad Commission hereinabove mentioned required application to joint line hauls of the single line rates established by the later circular, which is to say that under the opinion of the Circuit Court of Appeals the new single line scale of rates is applicable to all joint line shipments of subject materials to the station of Flour Bluff. Having so held, the Circuit Court of Appeals further decreed that the cause be "remanded to the court below for further proceedings not inconsistent with this opinion." There can be no "further proceedings" other than the entry of judgment in the District Court in accordance with the Circuit Court of Appeals' decision.

Motion for rehearing was timely filed and was denied by order of June 15, 1945.

The jurisdiction of the District Court rested upon the fact that the suit was brought by the United States (Section 41 (1), Title 28, UNITED STATES CODE).

Jurisdiction of the Supreme Court to Review the Judgment of the Circuit Court of Appeals

This Court has jurisdiction to grant a writ of certiorari and to review this case under the provisions of Section 347 (a), Title 28, UNITED STATES CODE.

Question Presented

The sole question presented is whether the general *joint line* rates on the subject materials, which were promulgated by the Texas Railroad Commission by the second circular (No. 13321, R. 97-120), have been applicable to joint line shipments of the subject materials from all points in Texas to the station of Flour Bluff since the effective date of such circular; or whether, because of the provisions of the first circular (No. 13156, R. 93), the *single line* rates provided in the second circular have been, since the effective date of the second circular, applicable to joint line shipments. The secondary question, which is determinative of the basic question, is whether the first circular, which was admitted by the Circuit Court of Appeals to have created a *special rate* in a "sense," was, in fact, a *special rate* and within the provisions and meaning of the second circular, which specifically provided that previously existing special rates should apply only where lower than the new general rates.

Reasons Relied on for the Allowance of the Writ

The writ of certiorari should be granted in the exercise of the Supreme Court's discretion because the Circuit Court of Appeals has rendered its judgment upon a supposed and asserted set of facts which are not true and which were not taken from or even suggested by the record in the case.

We realize fully the infrequency with which writs of certiorari are granted for any reason similar to that which is here set forth, and we realize further that the first reaction of any reader of this petition must be one of incredulity at the assertions made. We respectfully submit, however, that where it can be conclusively demonstrated, as it can be here, that the Circuit Court of Appeals has by its own opinion asserted the basis of its judgment to be facts which by no stretch of the human imagination can be deduced from or found to be suggested in the record, then surely the party whose rights are affected by that judgment has not had a fair trial and the Circuit Court of Appeals, in the words of the rules of this Court, "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision."

May we respectfully emphasize the fact that this petition is not based upon any consideration of the *preponderance* of evidence or as to whether there might or might not be a *scintilla* of evidence to establish the facts asserted to be the basis of the opinion of the Circuit Court of Appeals. We would not suggest that this Court should grant a writ of certiorari for the purpose of *weighing* evidence or testimony. Our contention here is that the Circuit Court of Appeals has reversed the judgment of the District Court and has stated as the reasons for its conclusions a set of facts which *is wholly absent from the record.*

The record will show that the case was tried to the District Court without a jury. No witness testified in person, and the only evidence offered by anyone was contained in the depositions of two so-called "experts," who are employees of the Railroad Commission of Texas (R. 66 and R. 131). Attached to the depositions of these witnesses were certain freight rate circulars or tariffs or orders issued by the Railroad Commission of Texas and certain letters written to the Commission.

The two witnesses who testified by deposition did not purport to know anything of the circumstances leading up to the issuance of the circulars and did not purport to testify in regard thereto. These witnesses testified to their conclusions as to the proper construction of the freight circulars, and these conclusions were very properly excluded by the trial court as improper evidence (Sup. Tr. 1).

In its brief in the Circuit Court of Appeals, the United States through its attorney made numerous statements of fact which were not contained in the record and to support which no reference was made to the record. Petitioners (appellees there), in their brief, pointed out to the Circuit Court of Appeals such fact. The brief of the United States in the Circuit Court of Appeals, however, did not compare in its deviation from the record with the opinion which the Court itself handed down.

The opinion of the Circuit Court of Appeals is short. It contains certain statements of fact which are unquestionably the basis of its decision and which cannot be found in the record at all. We will quote from the opinion in italics and comment upon such quotations.

> "*To facilitate and expedite the project, the Government determined to construct and maintain a railroad track 19 miles long from Flour Bluff Junction* * * *." (Second paragraph of Court's opinion.)

There is no suggestion in the record that "the Government" constructed or maintained or had anything whatsoever to do with the nineteen miles of railroad track mentioned. The only mention in the record of the matter is in the letter (R. 136, p. 124) to the Railroad Commission from one H. N. Roberts, in which he stated:

> "The rail extension to be constructed by the contrac-

tors under memorandum of agreement reproduced in Exhibit No. 2, attached hereto and made a part hereof, will be operated by the Texas Mexican Railway (one of petitioners herein) under appropriate Certificate of Convenience and Necessity which is now being sought."

The Circuit Court of Appeals said:

> *"Negotiations with carriers operating in the territory were begun in order to reach an agreement with respect to rate advantages to which the Government might be entitled by reason of using its own trackage."* (Second paragraph of Court's opinion.)

There is nothing in the record to suggest this statement.

The Circuit Court of Appeals said:

> *"The Government, by virtue of its construction and maintenance of the 19-mile track, was not an average customer."* (Fifth paragraph of Court's opinion.)

This is a repetition of the substance of the Court's prior statement, but the fact is there is no word of testimony to support the statement or to suggest it.

The Circuit Court of Appeals said:

> *"The partial elimination of these elements of expense not only entitled the Government to cheaper freight rates, but also deprived the railroads of grounds for charging normal rates."* (Fifth paragraph of Court's opinion.)

Aside from the fact that the Court's statement in regard to the "elimination of elements of expense" is not suggested by the record, it is squarely opposed to the facts of the case, if they could but be known.

The Circuit Court of Appeals said:

> *"The Government's pending claim to a favorable rate differential was not based upon considerations of a passing, temporal nature, but upon a permanent and unchanging status."* (Sixth paragraph of Court's opinion.)

Not only was there no witness who testified to this fantastic statement, but there was no witness who purported to have the slightest knowledge of any condition prevailing with respect to the Government's business or its operations. There is no evidence that the Government had claim to a "rate differential," and there is not a syllable of testimony concerning any of the conditions at Flour Bluff except a statement that quantities of materials were to be hauled there.

In this case the District Judge, a man long known and recognized as a high authority on Texas law, rendered the judgment of the District Court upon the evidence before the Court and with a profound knowledge of Texas law. The Circuit Court of Appeals has reversed this judgment upon a supposed set of facts which do not exist. It has furthermore indulged in the supposition that the Railroad Commission of Texas had the power to grant a freight rate differential to the Government of the United States when the most casual examination of Texas law would unquestionably reveal the absence of a possibility of that.

All this would result in damage to the petitioners in excess of a quarter of a million dollars.

Endeavoring to comply with the spirit of the rules of this Court as we believe them to have been interpreted from time to time, we refrain from argument in this petition on the merits of the case. We submit that a reading of the opinion of the Circuit Court of Appeals in the light of the record will show conclusively that petitioners have not had a consideration of their case based upon the record made at the trial. If this be untrue, it should be refuted easily by the Government in reply hereto. If this be true, we respectfully

submit we are entitled to an adjudication of the case on the facts as they are, and since this may now be had only in the Supreme Court of the United States, this writ should be granted.

Respectfully submitted,

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